

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

WICKFIRE, LLC,

Plaintiff,

v.

TRIMAX MEDIA, INC., *et al.*,

Defendants.

No. 2:15-mc-00051-RSL

SUPPLEMENTAL DECLARATION OF  
DAVID NAFFZIGER IN SUPPORT OF  
MOTION TO QUASH OR MODIFY  
SUBPOENA

Related Case: U.S. District Court for the  
Western District of Texas at Austin Case  
No. 1:14-CV-34-SS

David Naffziger states:

1. I am the president and chief executive officer of BrandVerity, Inc., a Washington corporation ("BrandVerity"). I have previously provided a declaration in support of BrandVerity's motion to quash or otherwise modify a subpoena served on BrandVerity by defendant Trimax Media, Inc. ("TriMax") in the matter of *Wickfire, LLC v. TriMax Media, Inc., et al.*, U.S. District Court for the Western District of Texas at Austin, Case No. 1:14-CV-34 (the "Texas Action"). The following supplements that declaration to respond to certain allegations made by TriMax in its opposition.

2. On or about April 14, 2015, BrandVerity received the Subpoena. Oddly, counsel for TriMax claims that BrandVerity filed its motion to quash "a month after BrandVerity received the Subpoena." Response at 3. This is obviously false; the motion was

1 filed May 7, 2015, 23 days after service, and after TriMax had failed to respond to my direct  
2 attempts to communicate and to BrandVerity's lawyer's efforts to communicate with  
3 TriMax's counsel. Yes, the Subpoena was signed by Ms. Brown on April 7, but as the check  
4 for a witness fee issued by Seattle Legal Messenger Services is dated April 14, 2015,  
5 TriMax's claim that it was delivered on April 7 rings hollow. Naffziger Dec. Ex. A. I  
6 understand that proof of service has not been filed in the underlying action and so is uniquely  
7 in the custody of TriMax's lawyers. They should produce the proof of service and, if  
8 TriMax's representations in response to the motion are false, counsel for TriMax should be  
9 sanctioned.

10 3. The crux of TriMax's opposition is that BrandVerity is fighting the Subpoena  
11 in bad faith. That is patently untrue.

12 4. First, BrandVerity has no "policy" of making third-party discovery expensive.  
13 As BrandVerity's president, I am of course concerned about the demands such discovery  
14 places on BrandVerity, given our scarce resources to respond. But BrandVerity has every  
15 intention of responding to reasonable requests as required by law.

16 5. BrandVerity in fact has virtually no experience with subpoenas or other  
17 discovery, and therefore no history of bad-faith avoidance of discovery obligations.  
18 BrandVerity has never been a party to litigation. We have not received any subpoenas in the  
19 history of the company in any matter except in this case. TriMax's first effort to subpoena  
20 documents from BrandVerity (through its former counsel), which occurred in October 2014,  
21 was patently defective. BrandVerity used the procedures allowed under Rule 45 of the  
22 Federal Rules of Civil Procedure to serve objections on TriMax's then counsel. A true and  
23 accurate copy of those objections is attached as Exhibit A. Following our assertion of these  
24 objections, TriMax's counsel did nothing – no effort to correct the defects or to contest the  
25 objections, no effort to negotiate a less-burdensome obligation, etc.

26 6. As soon as I became aware of the present Subpoena, on or about April 17,  
27 2015, I personally reached out to my contacts at TriMax directly, leaving two very cordial

1 voicemails with Laura Woodruff, asking that she get in touch with me. However, Ms.  
 2 Woodruff did not respond. It would probably have been better to involve counsel earlier, but  
 3 again, BrandVerity has no experience in these matters apart from the October 2014 subpoena  
 4 served in this case. I became frustrated with Ms. Woodruff's failure to respond. This then led  
 5 to my email of April 22, 2015, which contains the statement on which TriMax's opposition  
 6 rests: "Our approach to third-party suits in general is to make it as expensive as possible for  
 7 [the parties] to involve us." Ex. 1 to TriMax Response. The statement is taken wholly out of  
 8 context, as a reading of the entire email makes clear:

9 Do you have time to talk about the subpoena you sent?

10 Our approach to third-party suits in general is to make it as  
 11 expensive as possible for them to involve us. I can continue  
 12 doing this with your subpoena, but I'd really prefer to remain  
 13 out of the lawsuit entirely. Regardless, your subpoena is  
 14 ridiculously broad and if it remains unchanged I have no choice  
 15 but to contest and create a bunch of work for your legal team.

16 I'd be happy to discuss in more detail. Do you have 15 minutes  
 17 to speak?

18 I wanted to provoke a response, which thus far had not been forthcoming.

19 7. Following my April 22 effort, I re-sent the email on April 29 to Ms. Woodruff  
 20 and stated: "Please let me know by the end of Wednesday if you'd like to talk." This again  
 21 was a request for dialogue.

22 8. On April 29, 2015, I was contacted by Mr. Golden. I understand Mr. Golden is  
 23 the second-most senior lawyer representing TriMax in this case. This was the first contact I  
 24 had from TriMax after service of the Subpoena. I did not realize it at the time, but this was  
 25 exactly 15 days after service of the Subpoena, taking it out of the less-expensive "objections"  
 26 process under Rule 45. I contacted BrandVerity's counsel, Mr. Middleton, on April 30, to be  
 27 informed at that time that BrandVerity's sole recourse was to file a motion to quash or modify  
 the Subpoena.

9. At my direction, Mr. Middleton first prepared a letter, which after my review  
 was sent to TriMax's counsel on Monday, May 4. That letter, attached to my first declaration

as Exhibit B, listed particular objections to the Subpoena. The letter noted that BrandVerity would have no option but to file a motion to quash or modify “if agreement cannot be reached by Wednesday morning, May 6.” A motion to quash or modify had to be filed by Thursday, May 7, at the latest, to be pending by the return date for documents (May 8). The letter invited dialogue. However, BrandVerity received no response to the May 4 letter, in writing or otherwise – again, BrandVerity being stonewalled by TriMax and its counsel.

10. TriMax makes much of its interpretation of Mr. Middleton’s statement that he would be unavailable Tuesday, May 5. Mr. Middleton addresses this in his declaration, but he did not say that he only had one hour to speak with TriMax’s counsel on Wednesday morning. He identified a conflict at 9am that morning, but told TriMax’s counsel that he would make himself available even earlier. TriMax and its counsel could have responded to the May 4 letter in writing, but failed to do so. They could have proposed a different time to confer, but failed to do so. They could have alleviated the imminent need to file a motion to quash, but failed to do so. TriMax is represented by the Gardere firm of Dallas and three Gardere attorneys were identified in the Subpoena. Gardere’s website identifies four Gardere offices and lists “134 attorneys or other professionals in the Dallas office.” TriMax and its counsel have failed to state why none of the three lawyers identified in the subpoena, or any of the other “134 attorneys or other professionals in the Dallas office,” could address BrandVerity’s objections.<sup>1</sup>

11. Again, Mr. Middleton will address this in his declaration, but on May 7, 2015, prior to preparing and filing the motion to quash, he tried to reach Mr. Vogel, but received a message that Mr. Vogel was out for the day. He also reached Mr. Golden’s assistant, who told Mr. Middleton that Mr. Golden was out briefly and would call Mr. Middleton upon his return. Mr. Golden failed to do that.

12. BrandVerity therefore had no choice but to file the current motion to quash. It did so on May 7, serving TriMax’s counsel personally, by email, and by U.S. Mail. Mr.

<sup>1</sup> Pacer, the U.S. courts database, lists *five* Gardere attorneys working on the case.

1 Middleton sent the Gardere attorneys a letter, a true and correct copy of which is attached to  
2 this declaration as Exhibit A, concluding “I invited a conversation in my letter of May 4. I  
3 would still like to have that conversation.” Ms. Brown, who signed TriMax’s response,  
4 deferred that conversation until Monday, May 11. Mr. Middleton will address the content of  
5 that discussion in his declaration. I will simply note that BrandVerity received no further  
6 communication following that May 11 discussion, when TriMax still had seven calendar days  
7 to respond to the motion to quash (and nine days to the filing of its actual response).

8 13. As BrandVerity’s motion notes, the document requests incorporated into the  
9 Subpoena are very broad and confusing. Immediately upon becoming aware of the Subpoena,  
10 on April 17 I began (and Mr. Middleton continued) BrandVerity’s efforts to understand the  
11 Subpoena and its scope. Those efforts have been entirely frustrated by TriMax’s failure to  
12 respond. TriMax fails to deal with any of BrandVerity’s specific objections that the Subpoena  
13 is overbroad, ambiguous, and unduly burdensome. BrandVerity stands by its motion, and my  
14 first declaration, as to why the Subpoena is unduly broad and burdensome, particularly in  
15 light of the time constraints imposed. TriMax does nothing to contest these issues apart from  
16 claiming a ten-day “rule of thumb” and claiming that BrandVerity, as it advertises an  
17 advanced ability to capture data on the Internet, must have the resources available to it to  
18 respond.

19 14. To recap, BrandVerity is a small company. It has no dedicated resources for  
20 responding to the Subpoena and other requests. BrandVerity would have to cease its  
21 operations and focus entirely on responding to the Subpoena if the Subpoena is given its  
22 broadest interpretation. That, by definition, is an undue burden.

23 15. Yes, BrandVerity, through years of hard work, has produced software that  
24 enables it to monitor Internet advertising traffic. But it has no capability of simply flipping a  
25 switch to capture, comprehend and analyze all external correspondence, or to datamine all  
26 Customer data, which is apparently what TriMax seeks. (The examples of potentially relevant  
27 documents – two – are emails.)

1           16. As noted in the motion, BrandVerity's contracts with customers include the  
2 requirement that BrandVerity notify customers of efforts, like the Subpoena, to obtain copies  
3 of client-confidential information. BrandVerity's terms of service, which include this  
4 obligation, may be viewed here: <https://www.brandverity.com/tos/> Some of our larger  
5 customers have negotiated enterprise agreements that supersede these Terms. As best I recall,  
6 all of those agreements require a similar process for handling requests for confidential  
7 information. Uncontested by TriMax in its response is that BrandVerity has had as many as  
8 8,000 users of its services who might require notice of TriMax's efforts to obtain their  
9 confidential information.

10           17. TriMax again claims that BrandVerity received the Subpoena on April 7, then  
11 claims that BrandVerity waited "twenty-four days (more than three weeks) before notifying  
12 customers about their 'confidential information.'" This, as addressed previously, is false.  
13 BrandVerity received the Subpoena on or about April 14, the date of the check issued for a  
14 witness fee. It is impossible for BrandVerity to issue notices to more than 8,000 users whose  
15 confidential information may be implicated.

16           18. Using a very narrow interpretation of the document requests, I contacted four  
17 current or prior customers whose information was most directly implicated – TriMax itself,  
18 Chuck Hamrick of Hamrick.biz (who has broken his service agreement and had been allowing  
19 TriMax to access BrandVerity's system through his account), FiveCentShine, and Schaaf-  
20 PartnerCentric. Apart from these customers, it has made little sense to attempt to contact the  
21 other 7,996+ users unless and until TriMax explains and/or narrows its requests, which it has  
22 steadfastly failed and/or refused to do.

23           19. Identifying TriMax, Hamrick.biz, FiveCentShine, and Schaaf-PartnerCentric  
24 was relatively easy, but that is absolutely not an indication of how burdensome the Subpoena  
25 would be if enforced to its vague limits. TriMax's relevance is obvious. The Hamrick.biz  
26 data seemed to me to be an obvious target of Document Request No. 1. FiveCentShine's data  
27 was requested in the first TriMax subpoena and they are specifically mentioned in Document

1 Request No. 6. Similar concerns led to identification of Schaaf-PartnerCentric.

2 I declare under penalty of perjury that the foregoing is true and accurate.

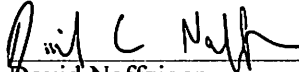
3 Executed at Seattle, Washington, this 22nd day of May, 2015.

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David Naffziger  
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1 Request No. 6. Similar concerns led to identification of Schaaf-PartnerCentric.

2 I declare under penalty of perjury that the foregoing is true and accurate.

3 Executed at Seattle, Washington, this 22nd day of May, 2015.

4   
5 David Naffziger



**CERTIFICATE OF SERVICE**

I, Alan S. Middleton, certify that on May 22, 2015, I caused a copy of the foregoing to be served upon the following by the means indicated.

Peter S. Vogel **By ECF**  
Gardere Wynne Sewell LLP  
Counsel for TriMax  
3000 Thanksgiving Tower  
1601 Elm Street  
Dallas, TX 75201-4761

John B. Crosetto **BY ECF**  
Garvey Schubert Barer  
1191 Second Ave. Floor 18  
Seattle, WA 98101-2996

Katharine M. Atlas **BY EMAIL: [katlas@atlastrialllaw.com](mailto:katlas@atlastrialllaw.com)**  
Atlas Law PLLC  
2625 Robinhood Street  
Houston, TX 77005

Bradley Coburn **BY EMAIL: [coburn@dclegal.com](mailto:coburn@dclegal.com);**  
Sherri A. Wilson **[Wilson@dclegal.com](mailto:Wilson@dclegal.com)**  
Denko Coburn Lauff LLP  
3811 Bee Cave Road, Suite 204  
Austin, TX 78746

DATED this 22nd day of May, 2015.

/s/ Alan S. Middleton  
Alan S. Middleton

## EXHIBIT A

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

WICKFIRE, LLC,

Plaintiff,

v.

TRIMAX MEDIA, INC.

Defendant.

No. 1:14-CV-34-SS

OBJECTIONS TO SUBPOENA  
DIRECTED TO BRANDVERITY, INC.

TO: Defendant named above; and

TO: Calhoun, Bhella & Sechrest, LLP, and Gwen E. Bhella, its counsel; and

TO: CSI Global Deposition Services and Briana Robinson

Non-party BrandVerity, Inc. ("BrandVerity") objects to the Subpoena to Produce Documents dated October 16, 1914, mailed to BrandVerity on the same date (the "Subpoena").

**GENERAL OBJECTIONS**

1. The Subpoena was not served upon BrandVerity in person as required by Fed. R. Civ. Proc. 45(b). Mail service is not sufficient in the Ninth Circuit under the rule. *See Chima v. U.S. Dept. of Defense*, 23 Fed.Appx. 721 (9th Cir. 2001). The Subpoena is therefore unenforceable.

2. Even if service had been valid, the Subpoena by its terms commands only

1 production of documents, not attendance at a deposition. Because the subpoena does not  
2 command attendance, BrandVerity objects to any form of deposition, whether in person or  
3 upon written questions. Further, the required witness fee was not tendered with the  
4 Subpoena; consequently, even if it were to have commanded attendance, attendance is not  
5 required. Finally, to compel attendance at a deposition (including one on written questions),  
6 the Subpoena must issue from the district court of the district in which the witness is to be  
7 examined. In this case, the Subpoena should have issued out of the U.S. District Court for the  
8 Western District of Washington, not the U.S. District Court for the Western District of Texas.

9 DATED this 3rd day of November, 2014.

10 Law Offices of Alan S. Middleton PLLC

11  
12 By:   
13 Alan S. Middleton, WSBA No. 18118  
14 18550 43rd Ave. NE  
15 Lake Forest Park, WA 98155  
16 Tel: (206) 533-0490  
17 [alanscottmiddleton@comcast.net](mailto:alanscottmiddleton@comcast.net)  
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**CERTIFICATE OF SERVICE**

I, Alan S. Middleton, certify that on November 3, 2014, I caused a copy of the foregoing Objections to Subpoena Directed to Brand Verity, Inc., to be served upon the following by the means indicated. Where U.S. Mail is indicated, the copy was mailed addressed as follows, postage prepaid.

Gwen E. Bhella **By Email and U.S. Mail**  
gbhella@cbsattorneys.com  
Calhoun, Bhella & Sechrest, LLP  
Counsel for Defendant  
325 N. Saint Paul Street, Ste. 2300  
Dallas, TX 75201

Edward A. Cavazos **By Email and U.S. Mail**  
Edward.cavazos@bgllp.com  
Bracewell & Giuliani, LLP  
Counsel for Plaintiff  
111 Congress Ave., Ste. 2300  
Austin, TX 78701

CSI Global Deposition Services **By U.S. Mail**  
Attn: Briana Robinson  
4950 N. O'Connor Rd., Ste. 152  
Irving, TX 75062

DATED this 3rd day of November, 2014.

  
Alan S. Middleton

## EXHIBIT B

Law Offices of

**Alan S. Middleton, PLLC**

18550 43rd Ave. NE  
Lake Forest Park, WA 98155  
(206) 533-0490  
alanscottm Middleton@comcast.net

May 7, 2015

**VIA EMAIL: pvogel@gardere.com; bgolden@gardere.com; sabrown@gardere.com**

Peter S. Vogel  
Barry M. Golden  
Sara Ann Brown  
Gardere Wynne Sewell LLP  
3000 Thanksgiving Tower  
1601 Elm Street  
Dallas, TX 75201-4761

**Re: *Wickfire, LLC v. TriMax Media, Inc.*, U.S. Dist. Ct. W.D. Texas Case No. 14-CV-34  
Subpoena to BrandVerity**

Dear Mr. Vogel, Mr. Golden, Ms. Brown:

Having received no response to my letter of May 4 on this subject, see enclosed motion to quash and supporting declarations of David Naffziger and Alan Middleton. These documents are also being sent to you via messenger for delivery today and by U.S. Mail.

Under the local rules of the Western District of Washington, the court expects the parties to stipulate to moving deadlines so as to allow an opportunity for a motion like the one enclosed to be heard. Please advise whether you will stipulate to moving the return date on the subpoena (as to documents) to not earlier than June 5, 2015 (two weeks after the noting date for the motion).

I invited a conversation in my letter of May 4. I would still like to have that conversation.

Very truly yours,

Law Offices of Alan S. Middleton PLLC



Alan S. Middleton

cc: Client  
Encs.